U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 May 2007

CASE NOS.: 2006-LHC-1976; 2006-LHC-1977; 2006-LHC-1978; and 2006-LHC-1979

OWCP NO.: 07-159053; 07-161567; 07-171342; and 07-174107

IN THE MATTER OF

M.G.,
Claimant

v.

LAKE CHARLES STEVEDORES, INC.,
Employer

J.J. FLANAGAN STEVEDORES,
Employer

PORTS INSURANCE COMPANY,
Carrier

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED,
Carrier

APPEARANCES:

M.G.,
Pro Se

Allan Brackett, Esq.,
Derek Mercer, Esq.,
On Behalf of Employer-Lake Charles Stevedores and Carrier-Ports Insurance Company

Mike Murphy, Esq.,
On behalf of Employer-J.J. Flanagan and Carrier-Signal Mutual Indemnity Association Limited

Before: Clement J. Kennington

Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq*., (2000) brought by M. G., (Claimant) against Employer Lake Charles Stevedores, Inc., (LCS) and its carrier Ports Insurance Company and Employer J. J. Flanagan Stevedores (JJF) and its carrier, Signal Mutual Indemnity Association Limited. The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on January 30, 2007 in Covington, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 16 exhibits which were admitted[1] LCS introduced 117 exhibits, while JJF introduced 20 exhibits. All LCS and JJF exhibits were admitted[2].

Post-hearing briefs were filed by the parties.[3] Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

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[1] References to the transcript and exhibits are as follows: trial transcript-Tr.__; Claimant's exhibits-CX-__, p.__; LCS exhibits-LCSX-__, p.__; JJF exhibits-JJFX-__p.__; LCS exhibits include various DOL documents (LS-202, 203, 206, 207, 208), employer verification of accident reports, medical reports from Drs. W. Carl Nabours, R. Dale Bernauer (LCSX-30 to 37), Claimant's wage records from West Gulf Maritime Association (LCSX-38, 39), claims or charges filed with DOL and N.L.R.B (LCSX-40 to 57), Claimant's Social Security records, Claimant's tax records, Claimant's court filings in 14th Judicial District Court of Calcasieu Parish and U.S. District Court for the Western District of Louisiana. (LCSX-60, 61), Claimant's educational records (LCSX-62, 63, 64), various correspondence between Claimant, his former counsel, LCS counsel, undersigned ALJ, David Duhon, Larry Jones, JJF counsel (LCSX-65 to 80, 95 to 111), U.S. District Court Order, Claimant's answers to discovery (LCSX-81 to 84), records of Louisiana State Board of Medical Examiners pertaining to Dr. Bernauer (LCSX-113), medical report of Drs. Rennie Culver and Dr. Daniel R. Yanicko (LSCX-114, 115) and Claimant's military records. (LCSX-117).

Claimant's exhibits include correspondence between Claimant, his former attorney and LCS attorney, medical reports from Dr. Thomas B. Ford, medical records of Claimant (MRI and X-ray reports, physical therapy), medical records from Dr. Carl Neighbors, DOL forms, payment of compensation by LCS to Claimant, unfair labor practice charges filed against ILA Local 24, JJF, LCS, medical records from St. Patrick Hospital dated July 6. 2004. JJF exhibits include Claimant's deposition of April 25, 2005, notification of drug testing, medical records of Dr. Clark A. Gunderson, superintendent's report of April 25, 2005 work injury.

[2] Most of LCS exhibits from LCSX-65 to LCSX-80 and LCSX-85 to LCSX-111 contain correspondence between Claimant and opposing counsel, various DOL and other government officials, and former Claimant's counsel and have minimal 50 relevance to the outstanding issues. Thus they will not be discussed except to the extent one of the parties can demonstrate a need to do so.

[3] More than two months post-hearing, Counsel for LCS sought to introduce Claimant's military records as LCSX-117 on the grounds that it was only recently received and could be used to refute and impeach Claimant's assertions about his medical history and military service which Counsel for LCS claims constitute a fundamental part of instant claim. As I informed the parties on April 13, 2007 said documents will be admitted, but only for the limited purpose

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The instant claims involve 4 separate injuries to Claimant on January 17, 2001; August 14, 2001; July 6, 2004; and April 25, 2005.

2. The injury of July 6, 2004, occurred while Claimant was an employee of JJF. The injuries of January 17, 2001; August 14, 2001, and April 25, 2005 occurred while Claimant was an employee of LCS.

3. LCS and JJF filed timely controversions.

4. JJF paid Claimant temporary total disability (TTD) for 9 weeks from July 22, 2004 through September 22, 2004; at the rate of $259.45 per week for a total of $2,355.05. (JJFX-1).

5. LCS paid Claimant for the January 17, 2001 injury a total of $ 2,008.38 for the period from January 18, 2001 through February 28, 2001 at the rate of $334.73 per week. [4]

6. LCS paid Claimant for the August 14, 2001 injury a total of $19, 348.77 at the rate of $297.02 per week for the period of September 12, 2001 through December 11, 2002. LCS paid no benefits for the April 25, 2005 injury. (CX-12).

II ISSUES

The parties presented the following issues:

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of refuting or confirming Claimant's medical history and military service. After reviewing said records, I find no basis to discredit Claimant's testimony concerning either his medical history or military service.

[4] LCSX-30, pp. 1-4 from West Gulf Maritime Association (WGMA) shows Claimant from January 18, 2,000 to January 17, 2001 making $15,626.90 in straight wages. Claimant's W-2 for 2000 shows Claimant making $4,044.00 in royalty payments. (LCSX-59, p. 10). When these figures are added to Claimant's vacation pay of $305.62 (LCSX 30, p. 4) and Bureau of Census pay of $1,122.the total compensation is $21,088.02 which divided by 52 = an AWW of $405.54, with a compensation rate of $270.33.

1. The rate of weekly compensation for the January 17, 2001 and August 14, 2001 injuries.[5]
2. Whether Claimant injured himself on April 25, 2005 while working for LCS.

3. Nature and extent of injuries: Whether Claimant reached maximum medical improvement for the January 17, 2001; August 14, 2001; July 6, 2004; and April 25, 2005 injuries.

4. Whether Claimant refused to follow the advice of treating physicians, Drs. Dale Bernauer and Vanda Davidson to discontinue longshore work because such work exceeded Claimant's physical capabilities. If so, whether Claimant was injured because of said refusal so as to exempt either LCS or JJF from liability for compensation or medical benefits.

5. Whether either LCS or JJF is responsible for Claimant's long standing mental problems.

6. Interest on either unpaid or untimely paid compensation.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant is a 46 year old male born on December 27, 1960. (JJFX-2, p. 5). Claimant has three years of college and a past history of alcohol and drug abuse including marijuana and cocaine. (Tr. 87). Claimant enlisted in the Louisiana Army National Guard on April 20, 1983. Claimant received an honorable discharge on April 19, 1989 when he completed his 6 year period of active duty training. (LCSX-117).

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[5] Claimant contends that his average weekly wage should include credit for time spent in going to DOL in Baton Rouge, Louisiana to file charges against LCS for refusing to pay longshore workers proper overtime compensation. (Tr. 116, LCSX-41). Claimant also seeks credit for time spent in bringing unfair labor practice charges to the NLRB against JJF, ILA Local 2047, and LCS (LCSX-42 to 57). None of NLRB's charges appear to have merit except one Claimant filled against Local 2047 (15-CB-4737) in which Local 2047r sought to recover from its members including Claimant legal fees Local 2047 incurred in defending itself from unfair labor practice charges these individuals brought against the local. (LCSX-55). Claimant attached copies of the NLRB charges to his brief.

Prior to the instant claims Claimant suffered previous injuries to his head, neck, shoulders, knee and back while working as a longshoreman in 1984, 1990, and 1996 from which he never fully recovered. (Tr. 88-94; LCSX-116, p. 26)[6]. Claimant denied ever being told by Drs. Bernauer or Davidson to stop longshore work. (Tr. 100,-105, LCSX-36, p. 58).

Claimant testified that on January 17, 2001, while stuffing containers with 110 pound bags of bogle he injured his right shoulder and lower mid-back. (Tr. 51-52, LCSX-1 to 7). Claimant reported the accident to LCS who in turn sent him to Dr. Carl Nabours who diagnosed a strain. About a week later Claimant went to his own treating physician, Dr. Bernauer, who ordered an MRI and physical therapy, diagnosed shoulder and lumbar strain and released Claimant on February 28, 2001 with no work restrictions. Claimant stayed off work from January 18, 2001 to March 4, 2001. (Tr. 53-55). Upon returning to work, Claimant resumed normal longshore activities.

Claimant testified that gang foreman select longshore workers for various jobs such as container stuffing, deck man, tow motor, hook-on-man, hole man and clerk based upon seniority once the worker indicates an interest in the position offered. (Tr. 56). Typically, Claimant tries to get the more physically demanding jobs such as container stuffing because of the higher rate of compensation these job pay. (Tr. 57, 58, 111). If container stuffing is not available, Claimant will elect to work less strenuous jobs such as hook-on-man. (Tr. 59-63).

Claimant worked from March 4, 2001 up to August 14, 2001 when he re-injured his back and right shoulder. (LCSX-12 to 22). [7] During this period, Claimant asserts he never reached "medical recovery" but worked instead and continued physical therapy in order to support his family. (Tr. 64). This second injury was worse than the January 18, 2001 injury and required right shoulder surgery which took place on October 10, 2002. (Tr. 65). Claimant returned to work on December 10, 2002 with the following restriction from Dr. Bernauer: 12-16 hours regular duty or 40 hours of light duty in a week. (Tr. 66)[8].

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[6]. Following the 1984 accident Claimant was out of work until July, 1986. (LCSX-116, p. 29). Claimant entered into an 8 (i) settlement agreement with LCS for the 1996 injury on September 15, 1998. (LCSX-40).

[7] A review of Claimant's WGMA earnings records for the period from August 15, 2000 to August 16, 2001 show Claimant working 116 days averaging 2.2 days per week making gross wages of $15,032.52. (LCSX-38, pp. 1-3). Container Royalty pay was $7,915.60 with vacation pay of $277.16 for a total of $ 23,225.28 per claimant's. 2001 tax return. (LCSX-59, p. 11-15). Dividing $23,225.28 by 52 and multiplying by 2/3 = an AWW of $446.64 and a compensation rate of $297.73.

[8] Claimant referred to Dr. Bernauer's modified duty restrictions as a "profile." (JJFX-2, p. 8). Medical records from Dr. Bernauer dated September 29, 2004 show Claimant able to work 18-24 hours per week full duty and 40 hours per week light duty with a 25% permanent disability to his back. (JJFX-2, p. 20). On October 8, 2006, Dr. Gunderson after examining Claimant released him to full duty. (EX-2, p. 22).

Claimant testified that thereafter he worked a mixture of regular and light duty averaging 24 hours per week. (Tr. 67, 68). He did this until his third injury of July 6, 2004. (Tr.69)[9]. By this date Claimant admittedly exceeded Dr. Bernauer's restrictions because only heavy or full duty was available in Freeport, Beaumont, and Houston where Claimant traveled to work. When a mixture of light and regular duty became available in Lake Charles in July, 2004, Claimant took this work. (Tr. 70). The week prior to the July 6, 2004 injury Claimant worked 54 hours. (Tr. 71).

On July 6, 2004, while working in a ship hole for JJF, Claimant slipped while standing on a sack he had already loaded into the ship hole.[10] In so doing, Claimant injured his lower mid-back. (Tr. 73-75). Claimant missed work from July 6, 2004 to September 22, 2004, after which he resumed working in pain under Dr. Bernauer's restrictions. (Tr. 76- 79, 123-125, 144-147).

Claimant was unable to find steady work and on April 25, 2005 while working for LCS and going from hatch to hatch, and throwing 50 pound sacks of soybean grit he began to experience severe shoulder and back pain and weakness which in combination with mental fatigue prevented him from working. (Tr. 80-85, 131, 132, 145-153; JJFX-2, pp. 2, 4; LCSX-23 to 29).[11] Claimant denied being "injured" referring to his problem as an aggravation causing his back and shoulder to go out. (LCSX-116, p. 109; Tr. 131, 132)[12]. Claimant reported the April 25, 2005 incident and accompanying pain to his supervisor. (Tr. 140, 141). Despite the pain Claimant worked from 7 am to 11:45 am. Since this incident, Dr. Bernauer has taken Claimant off work due to radiculopathy. (Tr. 136). Claimant admittedly was told by various doctors not to push himself to the point he hurt himself. (Tr. 155).[13]

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[9] A review of Claimant's earnings records from the West Gulf Maritime Association for the period from July 7, 2003 through July 6, 2004 show, however, that worked 77 days averaging 1.4 days per week for a total of 586.25 hours resulting in a gross pay of $10,249.19 with vacation pay of $289.00 and royalty pay of $9,987.67 for a total of $20,525.86 divided by 52= $394.73. (JJFX-8). From April 24 2004 to April 25, 2005, Claimant worked 74 days for a total of 470.75 hours making gross wages of $9,789.95. (LCSX-38, 39). Since WGMA records show no royalty or vacation pay for the 52 week period prior to the 2005 injury and the 52 week period prior to the 2005 injury (April 24, 2004-April 25, 2005) overlaps with the 52 week period prior to the 2004 injury, I have credited Claimant with the 2004 royalty and vacation pay of $9,987.67 and $289.00 resulting in total compensation of $20,264.34 which when divided by 52 results in an AWW of $389.70 and a compensation rate of $259.80.

[10] Claimant was working for JJF on the vessel "Wilson" when injured on July 6, 2004. (JJFX-5, p. 1).

[11] Claimant's WGMA earnings records for the period from August 15, 2000 to August 16, 2001 show Claimant working 848.75 hours making a total of $15,032.52 with 116 days of work averaging 2.2 days per week. (LCSX-38).

[12] Claimant testified he did not understand the term "injury." (Tr. 139).

B. Testimony of H. Stephen Arceneaux

Mr. Arceneaux, Gulf Regional Claims Director for Ports Insurance Company, testified about Claimant's April 25, 2005 injury wherein LCS superintendent Langley filled out various reports including an accident form indicating that Claimant experienced lower back pain while loading bags, but denied being injured. (JJFX-14, pp. 18-23). Mr. Arceneaux identified light duty releases for July 23, 2003 and March 25, 2004 for Claimant allowing him to work 18-24 hours a week at full duty and 40 hours of light duty because of back pain. (Id. at 24, 25). Mr. Arceneaux asked Claimant why he was throwing sacks, which was considered heavy manual duty when the medical releases appeared to restrict Claimant from such work. Claimant responded he had to work to feed his family. (Id. at 32). Mr. Arceneaux did not consider Claimant's complaints to constitute an injury. (Id. at 38).

C. Testimony of Dr. Dale Bernauer

Orthopedist, Dr. Bernauer, testified about his treatment of Claimant commencing in December 1984 for complaints of low back, cervical, and right knee pain.[14] Dr. Bernauer admitted Claimant's diagnostics were normal as were his examinations of Claimant. (LCSX-31, p. 8). Dr. Bernauer nonetheless diagnosed chronic lumbar strain. On May 29, 1986 he released Claimant to full duty with no restrictions indicating a complete medical recovery. (Id. at 12, 13). On September 2, 1987 Dr Bernauer treated Claimant for lumbar strain and recommended Claimant not return to longshore work. (Id. at 14).

Dr. Bernauer did not see Claimant again until June 12, 1996 when he diagnosed severe thoracic and lumbar spinal strain following a May 29, 1996 accident, wherein he was struck on the head and knocked out by 110 pound bean bags. (Id. at 16, 17). On examination, Claimant had decreased neck motion and thoracic spine compression. (LCX-36, p. 98). Dr Bernauer prescribed physical therapy. On July 22, 1996, Claimant underwent a cervical MRI which was normal. (Id. at 36). This was followed by an August 8, 1996 right shoulder MRI which showed minimal impingement and rotator cuff tendonitis. (Id. at 84). Motor conduction studies of August 22, 2006 were normal. (Id. at 83). A subsequent IME by Dr. Pennington showed Claimant at MMI with no permanent impairment. (Id. at 80). Claimant continued to see Dr. Bernauer on November 13, December 11, 1996; January 29, and March 10, 1996.

By February, 1998, Claimant's condition had improved and Dr. Bernauer released Claimant to full longshore work. (LCSX-31, p. 18). Several months later Claimant returned to see Dr. Bernauer complaining of pain with hard work. Dr. Bernauer released Claimant "to work as tolerated." (Id. at 19). Dr. Bernauer next saw Claimant on January 31, 2001 following his January 17, 2001 injury, at which time he diagnosed lumbar strain, and treated with a T.E.N.S.

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[13] Claimant worked in pain on April 24, 2005. However, this pain was much less intense that what he experienced on April 25, 2005. (Tr. 148,-153).

[14] Claimant was injured when 100 pound sack fell on him. (LCSX-37).

and body glove and placed on physical therapy. (LCSX-32, p. 19).[15] Therapy was discontinued on February 21, 2001. On February 28, 2001, Dr. Bernauer released Claimant to light duty. (Id. at 21). As of August 14, 2001 he was still on light duty and undergoing therapy, and thus, was not permitted to engage in throwing 110 pound sacks. (Id. at 22).

Dr. Bernauer testified thereafter, he never rescinded his light duty restrictions. (Id. at 23). However, by June 3, 2002, Claimant had a right shoulder impingement requiring acromioplasty on October 10, 2002. (Id. at 25). By June 18, 2003 Claimant had reached MMI from his 2001 injuries and was able to resume full duty.

On February 16, 2004, Dr. Bernauer released Claimant from his care. (Id. at 28). By February 17, 2004, Dr. Bernauer restricted Claimant to lifting no more than 25-50 pounds and no repetitive stooping, crawling or climbing. (Id at 29). On March 25, 2004 Dr. Bernauer changed the restrictions again to lifting no greater than110 pounds for 24 to 30 hours, and complete light duty. (Id. at. 30). As of May 16, 2005, Claimant asserted he could no longer tolerate the work due to pain. (Id. at 32). Dr. Bernauer agreed (Id. at 35).[16].

D. Claimant's Medical Records

Aside from Dr. Bernauer's files the records contains independent evaluations by orthopedist Dr. Jack Pennington on September 11, 1996; orthopedist, Dr. Vanda Davidson on March 17, 1997; a psychological evaluation of September 14, 2005; a psychiatric evaluation by Dr. Rennie Culver on 2006 and another orthopedic evaluation by Dr. Daniel Yanicko on July 5, 2006. In his September 11, 1996 evaluation, Dr. Pennington indicated objective data showed Claimant at MMI with the ability to resume regular duties and no permanent impairment.

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[15] LCS exhibits 32-35 shows Claimant seeing Dr. Bernauer on 48 occasions from 2001 to present on these dates: January 31, February 28, March 12, April 2, 9, August 1, 3, 7, 13, September 26, October 10, November 7, December 5, 14, 2001; January 9, February 27, April 10, May 22, June 3, July 31, September 25, October 23, December 4, 2002; March 31, April 31, June 18, July 23, August 6, October 8, 2003; February 16, June 7, September 20, 2004; February 23, 2005; January 2, February 6, March 6, 28, April 25, May 1+6, June 13, 14, July 19, 25, August 16, 29, October 4, 10, and November 7, 2006.

Treating records from visits of June 18, July 23, August 6, October 8, 2003 show the following: Jun 18-Claimant doing well and released to full duty; July 23-Claimant working regular duty of 18-24 hours a week with lumbar pain followed by an assessment on July 28, 2003 limiting him to 18-24 hours of full duty and 40 hours of light duty with a 25% permanent disability due to back problems; August 6-Claimant doing well; October 8-Claimant able to work 6 days of week of light duty with the ability to work 3-4 hours of heavy duty and full range of shoulder motion.

Subsequent visits in 2004 show the following: February 16-Claimant voiced continued lumbar spine complaints followed by instructions to limit lifting to 25-50 pounds (as opposed to 100 pounds which he throwing) with no stooping, crawling or climbing on a repetitive basis; March 11-Claimant allowed to work 5 hours per day 6 days per week throwing 100-110 pound sacks followed by no repetitive stooping, crawling or climbing on March 25, 2004; September 20-Claimant restricted to light duty 40 hours per week and 18-24 hours at regular duty. (JJFX-11). In a letter to LCS attorney, Derek Mercer, dated February 23, 2005, Dr. Bernauer stated Claimant could work 5 days a week light duty but only 3-4 days a week lifting 110 lb. sacks due to lower back and right shoulder pain. (Id. at 21).

[16] In fact as of April 25, 2005, Dr. Bernauer found Claimant unable to work. (See attachments to Claimant's brief).

(LCSX-36, pp. 76-80). In his March 17 1997 evaluation for DOL, Dr. Davidson diagnosed a mild right shoulder impingement with possible tendonitis and neck strain secondary to a sack fall with a prognosis for some improvement with therapy, but not to the extent that he would be able to return to the type of work he was doing prior to injury due to neck soreness. (Id. at 60). Dr. Davidson anticipated Claimant to be at maximum medical improvement after 6 weeks of physical therapy. (See OWCP -5 filed out by Dr. Davidson on March17, 1997 and attached to Claimant's brief).

On July 6, 2004 Claimant was seen and treated at St. Patrick Hospital in Lake Charles, Louisiana for low back pain and right hip pain. (JJFX-13). X-rays were negative. Claimant received pain medication including, Panlor and Flexeril, and was discharge in stable condition. A subsequent spinal lumbar MRI of August 6, 2004 showed mild disc bulging at L4-5 with mild bilateral neural canal narrowing, a mild bulge at L2-3, mild bilateral neural canal narrowing at L5-S1 and some loss of fat marrow throughout the lumbar vertebra. (JJFX-12).

On September 14, 2005 Claimant underwent a psychological evaluation at the request of Social Security Administration. The testing included a brief interview, history and mental status examination. Claimant had an extensive psychiatric history of outpatient treatment with evidence of alcohol and polydrug abuse, poor social functioning, poor insight, considerable irritability, depression, bipolar disorder which presented a substantial barrier to functional behavior. (JJFX-17).[17] In November, 2006, Claimant was awarded disability benefits by SSA based upon an affective disorder of listing level severity with marked restrictions of daily activities and social functioning which included severe impairments of thinking and concentration. (LCSX-58, pp. 23, 30; 116, 140).

Prior to that award, Claimant underwent a psychiatric evaluation by Dr. Rennie Culver in which he examined Claimant and thereafter, reviewed extensive medical and legal records pertaining to Claimant's work related injuries. During the interview Claimant displayed incoherent and loose associations with circumstantial and illogical thought processes. Dr. Culver diagnosed paranoid schizophrenia, substance abuse by history, personality disorder not otherwise specified, osteoporosis, sarcoidosis, essential hypertension, degenerative disc disease, and status post-acromioplasty. Dr. Culver described Claimant as floridly psychotic, disorganized and incoherent, and a "litigious paranoid" having filed multiple charges with the National Labor Relations Board with minimal merit. (LCSX-114).

On May 9, 2006 Claimant underwent a right shoulder MRI which showed tendinopathy of the supraspinatus and lesser extent infraspinatus with possible partial tear of supraspinatus and some degree of bursitis. A lumbar MRI of the same date showed mild degenerative changes from L1-L5. (LCSX-93, pp. 11-13). On July 5, 2006, Claimant underwent an IME by orthopedist Dr. Daniel Yanicko who diagnosed impingement tendonitis and bursitis of the right shoulder status post-acromioplasty, chronic lumbosacral strain, degenerative disc disease of the lumbar spine by history with unrelated problems with sarcoidosis, and coronary artery disease. At page 6 pf his report Dr. Yanicko states:

It is clear throughout (Claimant's) employment with P & O Port working as a longshoreman in Lake Charles for the past 24 years, that he has sustained multiple lumbar strain and sprain accidents on the right side. Throughout this process, the patient has maintained a desire to work up and through the last accident of April 24, 2005.

(Claimant) first claimed injury to his lower back as early as 1984. He has had several periods of physical therapy, which have helped and ultimately had returned to work on each of these occasions up to the six injuries to his back and right shoulder. Initial report of right shoulder problems back in 1982 were re-aggravated in 2001 for the right shoulder despite several injections, ultimately undergoing an acromioplasty by Dr. Bernauer in October, 2002, which helped the pain in the shoulder, but still maintains some residual weakness but allowing the patient to return to work as a longshoreman lifting up to 110 pound sacks to a limited time of thirty hours per weeks, five to ten hours per day.

Given the patient's heavy manual history at the P. & O. Ports in Lake Charles, there is no other history of extraneous injury in causation for both the right shoulder and low back problems and as such, these are directly related to be heavy manual labor over the years working at the P. & O. Ports. With these various strain and sprain injuries, he has required ongoing periods of medical treatment. Each new separate incident appears to be a new onset of lumbar and/or right shoulder strain and sprain as evidenced by his July 6, 2004 accident with J. J. Flanagan for which he saw Dr. Clark Gunderson for his lower back, but returned to work full duty without restriction after that point. The remainder of his injuries occurred while working as a longshoreman and harbors work for P.O. Ports, Lake Charles Stevedores.

What is unclear is in this whole process of treatment is the patients' most recent accident or incident of April 25, 2005. I feel the patient would do better as this point by being sent back to a physical therapy program for work hardening treatment of a least six weeks culminating in a functional capacity evaluation in an attempt to ascertain his current ability to return him to work.

….He appears to have had a satisfactory acromioplasty with some minor residual, but nothing that should limit his return to work. Further, over the years it appears that he has developed degenerative disc disease as a function of multiple lumbar strain and sprain injuries and years of heavy manual labor. (LCSX-115).

IV. DISCUSSION

A. Contention of the Parties

Claimant seeks additional compensation for 4 (four) separate injuries which occurred on January 17, 2001; August 14, 2001; July 6, 2004; and April 25, 2005 which allegedly resulted in low mid back, right shoulder, right hip impairments and mental unrest with the last injury of April 25, 2005 resulting in an aggravation of these conditions. Claimant also seeks medical expenses for the April 25, 2005 injury for which LCS has refused to pay either compensation or medical expenses.

Claimant argues that average weekly wages should be increased to $900.00 to reflect loss job opportunities from 2001 to 2005 when ILA Local 2047 union officials and employer gang foreman refused to hire him in retaliation for filing complaints with DOL for failure to pay proper overtime and with the NLRB for improperly requiring union members to pay legal fees to defend charges he brought against them and for violation of union hiring hall procedures. (JJFX-15, 16, 19, 20, LCSX-116, p. 73, 75-84; CX-1(e)). [18] Claimant also seeks to include Section 49 claims to this proceeding. However, since Section 49 had never been raised before this hearing, I denied Claimant's motion. (Tr. 170-178).

LCS contends that Claimant, who is currently receiving Social Security benefits for severe and life long mental problems (affective disorders and paranoid schizophrenia) which were neither caused nor aggravated by working conditions, is not entitled to any additional compensation, but rather, is physically able to perform light duty, management longshore positions (superintendent, walking foreman, gang foreman, gear man, operator/fork lift, clerk checker) and non-management positions, hook/unhook and motor).[19] Although it did not contest the existence of the first three injuries at the hearing, (January 17, August 14, 2001 and July 6, 2004) in its brief, LCS refers to these injuries as well as the fourth injury of April 25, 2005 as alleged and contends Claimant failed to establish a causal relationship between Claimant' physical and mental ailments and working conditions as mandated by *Director v. Greenwich Collieries* 512 U.S.267 (1994). LCS contends that none of the mental health professionals who have examined Claimant link Claimant's mental problems with work. Alternatively, if Claimant suffered any injury on August 14, 2001, it was due to Claimant deliberately performing heavy physical labor in violation of Dr. Bernauer's medical restrictions with Claimant's April 25, 2005 injury amounting to nothing more that a natural progression or aggravation of Claimant's July 6, 2004 injury. Concerning the first injury of January 17, 2001, LCS argues that the only witness to the event, Troy Malone, did not support Claimant's version of events. (LCSX-2). Further, Dr.

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[18] LCS entered into an agreement with DOL Wage and Hour Division agreeing to pay $228,410.38 in back wages to longshore workers because of LCS's failure to pay correct overtime based upon a complaint filed by Claimant. (LCSX-41).

[19] See page 18 of LCS brief.

Nabours who examined Claimant after the accident found nothing wrong and released Claimant to fully duty. (LCSX-29).

Concerning the issue of average weekly wage, LCS argues that Section 10 (a) was used to calculate the AWW for the first injury of January 17, 2001 since Claimant worked substantially the whole year prior to that injury. Using those figures (LCS paid Claimant 6 weeks of compensation based upon an AWW of $405.54 with a compensation rate of $270.37 which was later increased on May 11, 2006 due in negotiations with Claimant's former counsel to an AWW of$502.09 with a compensation rate of $334.75. (See LCSX-11).

In calculating the AWW for the August 14, 2001 injury LCS used Section 10 (a) taking his prior year income of $15,032.33 and adding $4,044.02 of container royalties, $305.62 in vacation pay, plus an additional $1,111.50 from the Census Bureau. In May, 2006, LCS supplemented this payment by $34.28 per week for a total payment of $2,228.20. (EX-22). LCS now contends the August 14, 2001 injury was caused by Claimant returning to heavy work before a medical release and without taking necessary precautions to prevent re-injury *Garumbley v. Eastern Associated Terminals Co.,* 9 BRBS 650 (1979); *Wright v. Connolly-Pacific Co.,* 25 BRBS 161, 165-67. Finally concerning the 4th injury of April 25, 2005, Claimant failed to identify any particular trauma that caused him to stop work while noting prior sporadic work attempts due in part to an altercation with a JJF superintendent in March, 2005, causing JJF not to rehire him. LCS maintains that the pain Claimant complained of was merely the natural progression of the July 6, 2004 injury for which JJX is responsible. *Metropolitan Stevedore Company v. Crescent Wharf and Warehouse Company (Price),* 339 F.2d 1102 (9th Cir, 2003); *Strachan Shipping Company v. Nash,* 782 F.2d 513 (5th Cir, 1986).

JJF contends that the medical records, medical testimony and WGMA records show that Claimant suffered only a temporary loss of wage earning capacity following the July 6, 2004 injury for which JJF fully compensated Claimant and provided all reasonable and necessary care.[20] After this injury Claimant's treating physician, Dr Bernauer, released Claimant to return to work on September 21, 2004, in the same condition as he was before the third injury. (JJFX-5, p.16; JJFX-11, p. 3). [21] Thereafter until the fourth injury, Claimant averaged more days of work per week than he did prior to the July 6, 2004 incident. [22]

JJF contends that Claimant timely reported a four, aggravating incident on April 25, 2005, as contained in a superintendent's injury report of that same day. (LCSX-23, p. 1). Further an LS-202 prepared by LCS on April 25, 2005, show Claimant claiming increased back pain following work that day. (LCSX-24). Claimant's hand written claim for compensation, LS-203 dated April 26, 2005, confirm Claimant had an accident at 9:45 a.m., but did not stop

[20] JJF computed Claimant's AWW for the 52 week period prior to July 6, 2004 as follows: royalty pay ($9,987.67) plus longshore wages ($10,249.19) for a total of $20,236.85 for an AWW of $389.17.

[21] Dr. Gunderson saw Claimant on September 21, 2004 and released Claimant to full duty (JJFX-10, p. 2). MRIs of 2001 and 2004 were according to Dr. Bernauer basically the same. (LCSX-31, p. 39).

[22] Claimant worked 1.4 days per week in the 52 week period prior to July 6, 2004 and 2.0 days per week from October 9, 2004 through April 25, 2005.

work immediately. (LCSX-25). Claimant's testimony at trial was consistent with and supported his prior claim. Further comparison of lumbar MRIs of May 9, 2006 with a lumbar MRIs of August 6, 2004 show right sided foraminal encroachment at L4-5 on the later MRI. (LCSX-12, p. 1; 18, p. 3). Dr. Bernauer's testimony further supported Claimant's allegations of a new injury or aggravation with new complaints of right leg weakness. (LCSX-31, pp. 40, 41, 46).

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc., v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

Despite Claimant's severe mental health problems, I credit his assertions about injuries or aggravations of pre-existing conditions on January 17, 2001, August 14, 2001, July 6, 2004 and April 25, 2005. Following the January 17, 2001 injury Claimant experienced right shoulder and low back pain which has prevented or restricted Claimant's ability to work as follows: temporary total disability (TTD) January 17, 2001-February 28, 2001; August 14, 2001 to December 10, 2002; July 6, 2004 to September 21, 2004; April 25, 2005 to July 5, 2006. However, to the extent he asserts periods of temporary or permanent partial disability for the following time periods (March 1, 2001 to August 13, 2001; December 11, 2002-July 5, 2004; and July 6, 2006, and continuing)due to shoulder or hip pain I do not credit such assertions for there is minimal objective evidence to support such assertions. Indeed, Claimant's performance of the most arduous longshore work for significant periods of time militates against such finding. I was not impressed by Dr. Bernauer's frequent changing of physical restriction when viewed in the context of no restrictions by other physicians such as Dr. Gunderson's assessment of September 21, 2004 (JJFX-10, p. 2), and Dr. Yanicko's July 5, 2006 assessment. (LCSX-115).

C. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc., v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(*quoting Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d)(2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of

substantial evidence to the contrary. 33 U.S.C. § 920(a)(2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d)(2002); *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc., v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

Section 20 provides that in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary: (a) that the claim comes within the provisions of this Act. 33 U.S.C. § 920(a). To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this prima facie case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related. *Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered an prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp*., 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption-the kind of evidence a reasonable mind might accept as adequate to support a conclusion-only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Ortco Contractors, Inc., v. Charpentier,* 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S. Ct.

825 (Dec. 1, 2003) (stating that the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), aff'd mem., 722 F.2d 747 (9th Cir. 1983) (stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv., Corp.*, 29 BRBS 18, 20 (1995)(stating that the unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co., v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv., Corp*., 29 BRBS 18, 20 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

In this case I find Claimant established a *prima facie* case with each of the 4 injuries. While LCS contends Claimant did not do so on the first and fourth injuries I find otherwise and am convinced by Claimant's credible testimony and the medical records including Dr. Bernauer's treatment records and the subsequent IME of orthopedist Dr. Daniel Yanicko that Claimant sustained multiple right shoulder and low back strains and sprains resulting in pain. Although LCS seeks to rely on Claimant's assertion of no "injury" on April 25, 2005, it is clear from Claimant's testimony that he did not know the legal definitions of "injury" but did know and express the fact that his work on April 25, 2005 aggravated his back and shoulder condition producing increased pain which has continued to exist and not allowed him to work. Thus, I find LCS did not rebut Claimant's *prima facie* case of physical back and shoulder injuries. Contrary to LCS's assertion I find no evidence to suggest Claimant intentionally harmed himself. Rather I find notwithstanding Dr. Bernauer's restrictions that Claimant worked generally within his physical capabilities as seen by long periods of extreme physical exertion without injury.

Regarding Claimant's mental problems, I find Employer by the reports of Drs. Culver and the Social Security Administration psychologist, rebutted any assertion by Claimant that his four accidents either caused or aggravated Claimant's mental problems (affective disorders or paranoid schizophrenia). Indeed, there is no evidence in either of these reports to suggest any work connection with Claimant's long standing mental problems.

D. Nature and Extent of Injury

Disability under the Act is defined as an incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing

period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). In this case, Claimant reached MMI for each of the 4 injuries by February 28, 2001; December 10, 2002; September 22, 2004; and July 5, 2006 with no residuals.

The Act does not provide standards to distinguish between classifications or degrees of disability. However, case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner***,** 661 F.2d at 1038; *P&M Crane Co., v. Hayes*, 930 F.2d at 429-30; *SGS Control Serv., v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). Claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984) (emphasis added). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP, v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions: (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

When an employer presents several different jobs that are available to a claimant, or when a claimant has worked several different jobs, it is appropriate to average the earnings to arrive at a fair and reasonable estimate of the claimant's earning potential. *Avondale Industries, Inc., v. Pulliam*, 137 F 3d 326, 328 (5th Cir. 1998)(finding that averaging several jobs offered by an employer was appropriate because the court has no way of determining which job the claimant will obtain and the average wage reflects all those jobs that are available); *Shell Offshore Inc., v. Cafiero*, 122 F.2d 312, 318 (5th Cir. 1997)(holding that averaging was a reasonable method to calculate a claimant's post-injury earning capacity); *Louisiana Insurance Guaranty. Ass'n. v. Abbott*, 40 F.3d 122, 129 (5th Cir.1994)(finding that averaging salary figures to establish earning capacity was appropriate and reasonable).

In this case, Claimant as noted above established the following periods of disability: temporary total disability (TTD) January 17, 2001-February 28, 2001; August 14,2001 to December 10, 2002; July 6, 2004 to September 21, 2004; April 25, 2005 to July 5, 2006. Claimant resumed full duty following each of these periods without loss of pay or residuals except for the last period at which time his unrelated mental impairment prevented him from working.

E. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000). Where neither Section 10(a) not Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Association v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred

that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir. 1997); *Deewert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9th Cir. 2001) (finding no support for the proposition that the time of the injury is when an employee stops working); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998). In occupational disease cases, the appropriate time for determining an injured workers average weekly wage earning capacity is when the worker becomes aware, or should have been aware, of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. § 910(i).

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. 33 U.S.C. § 910(a); *see also Ingalls Shipbuilding, Inc., v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000)(stating Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker." 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co., v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp., v. Wright*, 155 F.3d 311, 327 (4th Cir. 1998). In this case since Claimant was a 7 day a week worker Section 10 (a) is inapplicable.

2. Section 10(b)

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297; *Wilson*, 32 BRBS at 64. Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id*. To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id*. at 130; *Empire United Stevedores v. Gatlin,* 936 F.2d 819, 822 (5th Cir. 1991). In this case the record contains no wage information about comparable employees so Section 10 (b) is inapplicable.

3. Section 10(c)

If neither of the previously discussed sections can be applied reasonably and fairly, then a determination of a claimant's average annual earnings pursuant to Section 10(c) is appropriate.

33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297-98; *Gatlin*, 936 F.2d at 821-22; *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426 (5th Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury. *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

For the first period of TTD from January 17,2001-February 28, 2001, WGMA and W-2 records show Claimant making the following from January 18, 2000 to January 17, 2001: $15,626.90 in straight wages, $4,044.00 in royalty payments, vacation pay of $305.62 and Bureau of Census pay of $1,122.00 for a total of $21,088.02. When this figure is divided by 52 an AWW of $405.54 with a compensation rate of $270.36 results. For the second period of TTD from August 14, 2001 to December 10, 2002, Claimant's AWW is $ 446.64 ($23,225.28 divided by 52) with a compensation rate of $297.76. For the third period of TTD from July 6, 2004 to September 22, 2004, Claimant's AWW was $389.17 ($20,236.85 divided by 52) with a compensation rate of $259.45. For the fourth period from April 25, 2005 to July 5, 2006 Claimant's AWW is $ 389.70 ($20,264.30 divided by 52) with a compensation rate of $259.80. Claimant is not entitled to an increase in his AWW due to time spent on filing charges with governmental agencies.

F. Medical Benefits

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of

recovery may require. 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima facie case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.,* 16 BRBS 255, 257-58 (1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). In this case, LCS denied, but should have provided, Claimant medical treatment for the last period of impairment from April 25, 2005 to July 5, 2006. Medical benefits should be coordinated with those provided by Social Security.

G. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer LCS shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the following periods based on following average weekly wages and rates of compensation: January 17, 2001 to February 28, 2001-AWW of $405.54 and a corresponding compensation rate of $270.36; August 14, 2001-December 10, 2002-AWW of $446.64 and a corresponding compensation rate of $297.73; and April 25 2005 to July 5,2006-AWW of $389.70 and a corresponding compensation rate of $359.80. (See fn 4, 7 and 9).

2. Employer JJF shall pay to Claimant temporary total disability compensation pursuant to Section 908 (b) of the Act for the period of July 6, 2004 to September 22, 2004 at an AWW of $389.17and a corresponding compensation rate of $259.45.

3. Employers LCS and JJF shall be entitled to a credit for all compensation they paid to Claimant for the above time periods.

4.. Employer LCS shall pay Claimant for all reasonable medical care and treatment arising out of the April 25, 2005 work-related injury pursuant to Section 7(a) of the Act.

5. Employers' LCS and JJF shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. § 1961.

A

CLEMENT J. KENNINGTON
Administrative Law Judge